



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Adak Communications Systems, Inc.

File: B-228341

Date: January 26, 1988

DIGEST

Bidder's failure to acknowledge invitation for bids (IFB) amendment changing the line items under which costs for different parts were to be included but not changing the requirement to supply parts for radio repair services and requiring bidders to use manufacturer-approved replacement parts and testing equipment for the maintenance and repair of a particular type of radio equipment may be waived since these provisions merely clarified already existing requirements in the solicitation's performance work statement and bidding schedule and thus had no material effect on the procurement.

DECISION

Adak Communications Systems, Inc., protests the rejection of its low bid under invitation for bids (IFB) No. F07603-87-B0004, issued by Dover Air Force Base, Delaware, for the maintenance and repair of land mobile radios for a base year and 2 option years. Adak's bid, which was \$254,620.20 for all 3 years, was rejected as nonresponsive due to its failure to acknowledge a solicitation amendment. The Air Force intends to make award to the next low bidder, Motorola at \$298,725.

We sustain the protest.

The IFB as originally issued contained a Statement of Work (SOW) and a 103-page bid schedule which required separate unit prices for each piece of equipment to be maintained or repaired as well as for engineering services, nonrecurring services, and other items. The schedule also provided that the contractor would be reimbursed for direct materials (parts) required in the performance of the contract's nonrecurring services in an amount not to exceed \$5,000. Subsequently, IFB amendment 0002 was issued which substituted a Performance Work Statement (PWS) for the SOW. The amendment also deleted the original bid schedule and

041129

substituted a new schedule which contained only two line items for each of the 3 years. The first line item, 0001AA,^{1/} provided for the insertion of a price for all the maintenance and repair work required by the PWS. The second line item, 0001AB, provided that the contractor must supply "all direct materials [parts] required in the performance of the contract" and that the contractor will be reimbursed for those materials in an amount up to \$5,000. There is no provision for the insertion of a price under this line item and the \$5,000 was to be added to the bidder's price for item 0001AA to determine the evaluated bid price. A list of the equipment to be repaired or maintained was included as an attachment to the PWS.

The agency then determined that clarification was needed and issued amendment 0003. That amendment provided that the price in line item 0001AA should include all parts needed for preventive maintenance and repairs and that line item 0001AB was for reimbursement for batteries and parts that needed to be replaced due to physical abuse and acts of God. The amendment also incorporated an addendum which required bidders to have the manufacturer's testing equipment and manufacturer-approved replacement parts for repair of Digital Encryption Standard (DES) radio equipment.

Adak admits that it failed to acknowledge amendment 0003,^{2/} but argues that its bid should have been accepted because that amendment merely clarified what was already in the solicitation as modified by amendment 0002.

The agency responds that the amendment was material because it made the contractor responsible for the costs of parts used in preventive maintenance and repairs covered by item 0001AA and required the contractor to incorporate that cost in its price for the item. The agency estimates that the cost of those parts is about \$10,500 per year and notes that while Adak bid \$78,873 for the unamended item 0001AA, Motorola, which acknowledged the amendment, bid \$90,000 for the same item. In view of this disparity, the agency is concerned that Adak may not have been aware that under the amended schedule it could only be reimbursed for a limited number of the parts that it used (batteries and replacements for abused parts) under item 0001AB. From this the agency

^{1/} Each of the two options contained corresponding line items, 0002AA, 0002AB, 0003AA and 0003AB.

^{2/} The protester did acknowledge both amendments 0001 and 0002.

concludes that the amendment could have had a \$10,500 impact on Adak's price for the base year (and presumably a similar impact on the prices for the 2 option years) and therefore is not trivial and could not be waived.

A bidder's failure to acknowledge a material IFB amendment renders the bid nonresponsive, since absent such an acknowledgment the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Maintenance Pace Setters, Inc., B-213595, Apr. 23, 1984, 84-1 CPD ¶ 457. An amendment is material, however, only if it would have more than a trivial impact on the price, quantity, quality, delivery, or the relative standing of the bidders. See Federal Acquisition Regulation, 48 C.F.R. § 14.405 (1986). An amendment is not material where it does not impose any legal obligations on the bidder different from those imposed by the solicitation as it existed prior to the particular amendment was issued as, for example, where it merely clarifies an existing requirement. Tri-S, Inc., B-226793.2, June 26, 1987, 87-1 CPD ¶ 634.

We do not believe that the portion of amendment 0003 concerning the bid schedule made any material changes in the solicitation's legal requirements. The amendment did not change in any way the underlying obligation of the contractor to provide the parts needed to perform the maintenance and repair work described by line item 0001AA. The amendment merely changed the extent to which the government would reimburse the contractor for parts used in doing the work under line item 0001AB.

The amendment does, however, change the type of parts for which the contractor is to be reimbursed under item 0001AB. Before amendment 0003, the contractor would be reimbursed up to \$5,000 for all the parts it needed. Under the amended schedule only the cost of batteries and replacement parts for abused components could be reimbursed under that line item. The cost for all other parts needed for maintenance and repair work had to be included in the price for line item 0001AA.

Nevertheless, it seems to us that considering the solicitation's ceiling on reimbursements the maximum amount by which Adak could possibly benefit by bidding under the preamendment schedule would be \$5,000 for each of the 3 years, or \$15,000. Adak's total bid for the 3 years was approximately \$44,000 lower than the awardee's bid. The agency has not contended that the amended schedule altered its legal relationship with the contractor to the agency's advantage. Further, since whatever pecuniary advantage that Adak might gain (none is clear) is limited to \$15,000 if the

options are exercised, an amount which would still leave Adak the low bidder by a considerable amount, we conclude that this portion of the amendment did not have a material impact on the procurement.

Amendment 0003 also, however, required the inclusion in the PWS of an additional clause concerning DES equipment maintenance. That clause stated that only replacement parts approved by the original manufacturer may be used in the repair and maintenance of DES equipment and that the contractor must use the manufacturer's documentation and required test equipment and perform maintenance to the manufacturer's specifications. The agency contends that this clause "imposed on bidders additional obligations" but offers no further explanation. While the PWS does not specifically refer to DES equipment, it provides at section C-5 that "[o]nly original manufacturer's parts shall be used," and that the "equipment shall be maintained . . . in accordance with the applicable manufacturer's specifications." We think that this requirement substantially duplicates the material to be included by the DES clause in amendment 0003. In the absence of any explanation from the agency as to exactly what this clause adds to the solicitation requirements, we conclude that it was merely a clarification of the requirements already in the solicitation.

Based on the above, we believe that amendment 0003 did not impose any additional material legal requirements on the bidder and thus Adak's failure to acknowledge the amendment should have been waived as a minor informality. B&T International, Inc., B-224284, Dec. 8, 1986, 86-2 CPD ¶ 654. Consequently, we are recommending that the award be made to Adak if otherwise appropriate.

Adak is not entitled to the costs of filing and pursuing its protest in view of our recommendation that Adak be awarded the contract and assuming it actually receives the award. Baurenovierungsgesellschaft, m.b.H., B-220809.2 et al., Aug. 5, 1986, 86-2 CPD ¶ 145. See Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1987).

The protest is sustained.

Walter J. Jordan
for Comptroller General
of the United States